Plaza Singapura (Pte) Ltd v Cosdel (S) Pte Ltd & Anor

COURT OF APPEAL (SINGAPORE) — CIVIL APPEAL NO 15 OF 1988
WEE CHONG JIN CJ, SINNATHURAY AND THEAN JJ
3 SEPTEMBER 1990

Landlord and Tenant — Distress — Release of goods distrained under writ of distress — Beneficial interest in tenancy of premises — Whether tenant reputed owner of goods — Distress Act (Cap 84, 1985 Ed), ss 10(1)(c) & 12(a) — Bankruptcy Act (Cap 20, 1985 Ed), s 47(1)(b)(iii)

Landlord and Tenant — Tenancy, beneficial interest in — Whether arrangement between tenant and third party gave rise to contractual licence or whether third party was direct beneficiary of tenancy

Evidence — Judicial notice — Trade custom or usage — Whether judicial notice can be taken of practice of consignment trade

Evidence — Trade custom or usage — Burden of proving existence of alleged trade custom

The appellants are the owners of the building known as Plaza Singapura. They leased to the second respondent ('the tenant') parts of the premises on the third floor known as units #03-39 to #03-47 ('the demised premises') for a term of three years. The tenant later entered into an arrangement in writing with Cosdel (S) Pte Ltd ('Cosdel'), the first respondent, whereby the tenant allocated an area of about 950 sq ft of the demised premises for Cosdel to display its articles for sale, and Cosdel agreed to pay to the tenant a 'monthly rent' of $4,560. Under the arrangement, sales of Cosdel's articles were attended to by two Cosdel's salesgirls who wore uniforms different from those worn by the tenant's salesgirls. However, the articles were sold through the tenant's cashiers, who used a special code for such sales and issued receipts bearing the tenant's name. The sales were entered in the books of the tenant and the tenant paid to Cosdel the proceeds from these sales, less the agreed sum of $4,560 on the tenth day of every month. The articles, however, bore the name Kalms, which is the business name of Cosdel and were displayed on shelves belonging to Cosdel, which, it was claimed, bore Cosdel's distinctive features.

The tenant fell into arrears of rent and the appellants obtained leave to issue a writ of distress from the High Court to recover a sum of $53,380.46. All the goods, including those articles of Cosdel, in the demised premises, were distrained. Cosdel applied for an order that those distrained articles which belonged to it be released and the time for making the application be extended. The application was allowed by the High Court (see [1988] 2 MLJ 166). The appeal centred on the following issues:

(i) whether Cosdel, under the arrangement with the tenant, had a beneficial interest in the tenancy of the demised premises within the meaning of s 10(1)(c) of the Distress Act (Cap 84, 1985 Ed) ('the Act');
(ii) whether Cosdel's articles were at the material time in the possession, order or disposition of the tenant by the consent and permission of Cosdel under circumstances that the tenant was the reputed owner thereof within the meaning of s 12(a) of the Act;
(iii) whether, in deciding issue (ii) above, the judge was entitled to take judicial notice that the consignment arrangements were a very common practice in Singapore; and if he was not entitled to do so, whether Cosdel had discharged the burden of proving the existence of the alleged trade custom.

Held, allowing the appeal:

(1) The arrangement that Cosdel had made with the tenant did not confer on the former any beneficial interest in the tenancy of the demised premises or any part thereof. The tenancy was held at all material times by the tenant in its own right, and there was nothing in that arrangement which obliged it to hold the tenancy in trust for Cosdel. Cosdel only had a licence to display its articles for sale in the designated area and to have two salesgirls there to attend to the sales. Cosdel did not have possession, or right to possession, of the area, and its articles were all material times in the custody and possession of the tenant.

(2) A commercial or other usage may be so often proved in courts that the courts will take judicial notice of it. At the primary stage, the necessity of proof requires that the particular usage must be proved with certainty and precision. The mere proof and establishment of a valid usage once only does not of itself entitle a person in a subsequent action to dispense with proof of the usage. Where there are several cases in which the usage has been established, this fact will cause the court to take judicial notice of the usage. The cases must not be contradictory but must appear to the court to be sufficient to establish that the alleged usage has been frequently proved.

(3) In this case, the parties were only at the primary stage and the particular trade usage had yet to be proved with certainty and precision. Such commercial usage has not been proved in our courts, and counsel had not cited a single decision in which it was held that 'such a trade custom in Singapore more prevalently known as the consignment trade' had been proved to exist. The learned judge therefore ought not to take judicial notice of the practice of consignment trade in Singapore.

(4) In order to establish a custom it must be proved to have existed so long, and to have been so extensively acted upon, that the ordinary creditors of the debtor in his trade may be reasonably presumed to have known it. In this case, Cosdel had not proved the consignment trade custom on which it relied.

(5) The test of reputed ownership is whether in all the circumstances, a reasonable man would necessarily infer that the tenant was the owner of the articles in question, and that this inference is one which must in the circumstances arise.

(6) Applying this test, the court found that the tenant was the reputed owner of the articles, for the following reasons:

(a) Though separate shelves were used to display Cosdel's articles, and presumably in a separate area, there was no partition between this area and other areas which displayed and sold goods belonging to the tenant. Any customer visiting the demised premises would have observed that only one business was carried on there, and that was the business of the tenant. There was nothing in the shop to show that the tenant was not the owner of all the goods, and other movable property; no signboard was displayed that indicated that the articles sold on Cosdel's shelves were those of Cosdel.
(b) Cosdel had not adduced evidence to show that the customers visiting the demised premises would know what 'Kalms' was or whose name it was, and why the price tags with the name 'Kalms' should disabuse such customers of the impression that these articles belonged to the tenant. The tenant owned and operated the business in the demised premises, actually sold the articles and gave valid receipts for the payments therefor.

In such circumstances, the inference which a reasonable man would necessarily draw is that all articles displayed for sale belonged to the tenant, and the inference is one which, in those circumstances, must arise. The tenant was therefore the reputed owner of the articles.

(7) The tenant had some right of property in the articles; in particular, it had the property in the articles which it could pass to purchasers on sale of the articles and all such sales were transacted by the tenant. The tenant was required to take out insurance on all merchandise and fixtures against fire and theft, and any stock discrepancy in excess of 3% of the record value after interim and year-end stock counts of Cosdel's goods were to be shared equally between them at the 'retail value' of the merchandise. Cosdel had not therefore shown that the tenant at the time of distress had no right of property or beneficial interest in the articles claimed by Cosdel.

Cases referred to

1 *Re Couston, ex p Watkins* (1873) 8 Ch App 520 (folld)
2 *Re Matthews, ex p Powell* (1875) 1 Ch D 501 (folld)
3 *Re William Watson & Co* [1904] 2 KB 753 (folld)
4 *Re Kaufman Segal and Domb* [1923] 2 Ch 89 (folld)

Legislation referred to

Bankruptcy Act (Cap 20, 1985 Ed) s 47(1)(b)(iii)
Distress Act (Cap 84, 1985 Ed) ss 10(1)(c), (2), 12(a)

Appeal from: Originating Summons No 209 of 1987, Distress No 9 of 1987 and Summons-In-Chambers No 1504 of 1987 (High Court, Singapore)

Gan Hiang Chye for the appellants.
David Hiew for the first respondents.
Choi Yok Hung (Miss) for the second respondents.

Cur Adv Vult

Thean J (delivering the judgment of the court): Plaza Singapura (Pte) Ltd, the appellants abovenamed ('the appellants'), are the owners of the building known as Plaza Singapura situated at Orchard Road. By a lease dated 23 October 1985, the appellants leased to Shizuoka Yajimaya (Singapore) Pte Ltd, the second respondent abovenamed ('the tenant'), parts of the premises on the third floor known as units #03-39 to #03-47 ('the demised premises') for a term of three years commencing from 25 January 1985 on terms and conditions therein more particularly stated. By cl 2(aa) of the lease, the tenant covenanted with the appellants as follows:

> Not to assign sublet license or in any way dispose of or part with possession of the demised premises or any part thereof or either by way of sub-letting sharing or other means whereby any company person or persons not a party to this lease obtains the use or possession of the demised premises or any part thereof irrespective of whether or not any rental or other consideration is given for such use or possession and in the event of such transfer or sharing this lease shall at the option of the landlord forthwith be determined and the tenant shall forthwith surrender the demised premises to the landlord with vacant possession. For the purposes hereof any amalgamation and/or reconstruction effected by the tenants (if a company) shall be deemed an assignment of this lease.

Pursuant to the lease, the tenant took possession of the demised premises and carried on thereat the business of selling books, magazines, stationery and educational toys.

On or about 3 September 1985, unknown to the appellants, the tenant entered into an arrangement in writing with Cosdel (S) Pte Ltd, the first respondent abovenamed ('Cosdel'), whereby the tenant allocated an area of approximately 950 sq ft of the demised premises for Cosdel to display its articles for sale, and Cosdel agreed to pay to the tenant a 'monthly rent' of $4,560. Pursuant to the arrangement, Cosdel's articles were sold at the demised premises, and the sales of these articles were attended to by two of Cosdel's salesgirls who wore uniforms different from those worn by the salesgirls of the tenant. However, Cosdel's articles were sold through the tenant's cashiers, who used a special code assigned for such sales and who accepted payments from purchasers and issued receipts bearing the tenant's name. These sales were entered in the books of the tenant, and on the tenth day of every month, the tenant paid to Cosdel the proceeds from these sales, less the agreed monthly sum of $4,560. All the articles of Cosdel, except 'Hallmark' cards, were labelled with 'Kalm's' price tags; the word 'Kalm's' was the business name of Cosdel. They were displayed on the shelves belonging to Cosdel, and it was claimed that the layout, design, colour scheme and general appearance of the shelves bore Cosdel's distinctive features common to all stores of Cosdel in Singapore and were different from those shelves used by the tenant in the demised premises.

Subsequently, in early 1987, the tenant fell into arrears of rent, and on 19 February 1987 the appellants obtained an order from the High Court granting leave to issue a writ of distress against the tenant to recover a sum of $53,380.46, being the arrears of rent for two months, January and February 1987. Pursuant to the order, a writ of distress was issued and was executed at the demised premises on 23 February 1987. All the goods, including those articles of Cosdel, in the demised premises were distrained. Cosdel thereupon took out an application on 6 March 1987 for an order that those distrained articles which belonged to it be released and the time for making the application be extended.

The application was heard before Lai Kew Chai J in chambers. The contest was essentially between the appellants and Cosdel; however, the tenant was served, and its counsel also appeared at the hearing. At the conclusion of the hearing, the learned judge allowed the application and ordered that the distrained articles claimed by Cosdel be released to it, that the time for making the application be extended and that the appellants pay the costs of Cosdel and the tenant: see *Plaza Singapura (Pte) Ltd* v *Shizuoka Yajimaya (Singapore) Pte Ltd (Cosdel (S) Pte Ltd, claimants)* [1988] 2 MLJ 166. Against the decision of the learned judge this appeal was brought, and at the conclu-

sion of the hearing of the appeal we allowed it: we set aside the order of the learned judge and dismissed the application of Cosdel, and ordered Cosdel to pay the costs of the appellants and the tenant, here and below.

The jurisdiction of the court to entertain an application for the release of goods distrained under a writ of distress is found in s 10 of the Distress Act (Cap 84, 1985 Ed) ('the Act'), which provides as follows:

> (1) Where any movable property of —
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> (a) any under-tenant;
> (b) any lodger; or
> (c) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,
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> has been seized under a writ of distress issued to recover arrears of rent due to a superior landlord by his immediate tenant, such under-tenant, lodger or other person aforesaid may apply to a judge to discharge or suspend the writ, or to release a distrained article.
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> (2) No order shall be made unless such under-tenant, lodger or other person aforesaid satisfies the court that the tenant has no right of property or beneficial interest in the furniture, goods or chattels and that such furniture, goods or chattels are the property or in the lawful possession of such under-tenant, lodger or other person aforesaid; and also in the case of an under-tenant or lodger unless such under-tenant or lodger pays to the landlord or into court an amount equal to the arrears of rent in respect of which distress has been levied and also undertakes to pay to the landlord future rent, if any, due from him to the tenant:
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> ...

Section 10, however, is subject to s 12, which, so far as relevant, provides:

> Section 10 shall not apply to —
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> (a) goods belonging to the husband or wife of the tenant whose rent is in arrear, or to goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant, or to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof;

Before the learned judge, two issues were raised. The first issue was whether Cosdel had any beneficial interest in the tenancy of the demised premises or any part thereof within the meaning of s 10(1)(c) of the Act. If Cosdel had such beneficial interest then it would be precluded from making the application. On this issue, the learned judge considered the arrangement made between the tenant and Cosdel, and came to the conclusion that the tenant granted only a licence to Cosdel to display its goods for sale in the designated area of the demised premises and to allow its salesgirls to attend to the sales of such goods, the tenant retaining possession over such goods, and that Cosdel had no beneficial interest in the tenancy of the demised premises or any part thereof. Before us, counsel for the appellants contended that Cosdel by reason of the arrangement made with the tenant had a right of occupation of the designated area of the demised premises and paid a 'monthly rent' therefore, and that by that arrangement Cosdel had carved out of the tenancy a contractual licence to occupy that part of the demised premises and display its articles there. Cosdel, therefore, was a direct beneficiary of the tenancy of the demised premises. We rejected this argument. The tenancy was held at all material times by the tenant in its own right, and there was nothing in that arrangement which obliged it to hold the tenancy in respect of any part of the demised premises in trust for Cosdel. All that Cosdel had by that arrangement, as the learned judge held, was a licence to display its articles for sale in the designated area of the demised premises and to have two salesgirls there to attend to the sales of such articles. Cosdel did not have possession, or right to possession, of the area, and its articles were at all material times in the custody and possession of the tenant. In our opinion, the arrangement Cosdel had made with the tenant did not confer on the former any beneficial interest in the tenancy of the demised premises or any part thereof.

The second issue was whether Cosdel's articles were at the material time in the possession, order or disposition of the tenant by the consent and permission of Cosdel under such circumstances that the tenant was the reputed owner thereof within the meaning of s 12(a) of the Act. There was no dispute before us and before the learned judge that the articles in question were at the material time in the possession, order, or disposition of the tenant by the consent and permission of Cosdel, the true owner of the articles. The crux of the issue was whether the circumstances were such that the tenant was the reputed owner of the articles. The learned judge, in determining this issue referred to the passage of the judgment of Lord Selborne LC in *Re Couston, ex p Watkins*[1] at pp 528 to 529 (to which we shall revert in a moment) on the doctrine of reputed ownership in bankruptcy laws and considered in detail the arrangement made between the tenant and Cosdel. He accepted as evidence three letters, each in identical terms, written by Cosdel to Yaohan Singapore Pte Ltd, CK Tang Ltd, and Metro (Pte) Ltd respectively, which contained a confirmation by the three companies that under the arrangements Cosdel made with them respectively Cosdel's goods were delivered to and displayed in their stores; that all unsold goods remained the property of Cosdel and were returnable to Cosdel, and that this consignment arrangement was a common practice in the retail trade for goods similar to Cosdel's. The learned judge then took judicial notice of this common practice. He said at pp 168 to 169:

> The claimants have also produced evidence of similar consignment arrangements entered into with other retail outlets

in Yaohan, Metro and CK Tang which are well-known department stores in Singapore. I am prepared to take judicial notice of the fact that these consignment arrangements are very common in our metropolis which boasts of many department stores and retail outlets. Any well-informed landlord would know of these trade practices.

In these circumstances, effect must be given to these consignment arrangements and no landlord can be heard to say that they had let their premises in the knowledge or expectation that they could levy distress on the goods of these consignors. I find it is not at all realistic or legitimate in the interest of the trade in all the circumstances to infer that the defendants were the reputed owners of the claimants' goods.

Counsel for the appellants mounted a lengthy argument on this determination of the learned judge, and his argument may be summarized as follows. Cosdel was relying on a 'trade custom in Singapore more prevalently known as the consignment trade': see the affidavit of David Ang, the general manager of Cosdel, affirmed on 18 May 1987. The burden then was on Cosdel to prove the existence of such a trade custom or at least that the consignment arrangement as described by David Ang was a common practice in the retail trade of goods similar to Cosdel's. However, the learned judge did not decide whether Cosdel had discharged this burden of proof, because he took judicial notice of 'the fact' that these consignment arrangements were very common in the retail trade in Singapore. Counsel submitted that in the circumstances of this case it was not open to the learned judge to take judicial notice of such a matter, as such a fact had not been established. He further submitted that had the learned judge required proof of the existence of the alleged trade custom, he would have found that, on the evidence, Cosdel had failed to discharge the burden of proof. No witness was called by Cosdel to give any evidence of the consignment arrangements in the retail trade; nor was any affidavit filed by any witness testifying the existence of such a trade custom. Cosdel relied on the three letters written by David Ang, its general manager, to the three companies, Yaohan Singapore Pte Ltd, CK Tang Ltd, and Metro (Pte) Ltd, with their confirmation of the arrangements endorsed thereon and signed by representatives of the three companies respectively. The terms of these letters were, in effect, the very words which David Ang wanted the addressees thereof to acknowledge and confirm. In consequence, these letters, counsel submitted, had no probative value. There was, therefore, no evidence of the alleged trade custom. It followed that the contractual arrangement between the tenant and Cosdel was essentially a private affair between them, the knowledge of which could not be constructively attributed to the appellants so as to fix them with notice of the fact that the articles in question were owned by Cosdel and not by the tenant.

The argument of counsel, basically, raised two questions: (i) whether the learned judge was entitled in the circumstances to take judicial notice, which he did, that the consignment arrangements were a very common practice in Singapore, and (ii) if he was not entitled to take judicial notice, whether Cosdel, on the material before the court, had discharged the burden of proving the existence of the alleged trade custom, ie that the alleged consignment arrangements were a common practice in the retail trade in Singapore. On the first question, the law as to when a court may properly take judicial notice of a trade custom or usage — according to the learned editors of 12 *Halsbury's Laws of England* (4th Ed) the correct term is usage and not custom: see para 402 — is summarized in paras 479 and 480 of 12 *Halsbury's Laws of England* (4th Ed):

> 479 **Judicial notice of usages.** A commercial or other usage may be so often proved in courts of law that the courts will take judicial notice of it. This is done in order to avoid putting the parties to the unnecessary expense of having to prove, by a large number of witnesses, a usage which has been proved over and over again. As regards the necessity of proof, usages pass through certain stages. There is the primary stage when the particular usage must be proved with certainty and precision; there is the secondary stage when the court has become to some degree familiar with the usage, and when slight evidence only is required to establish it; and there is the final stage when the court takes judicial notice of the usage, and evidence is not required.
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> 480 **Degree of proof of usage.** The courts have not laid down any guiding rule as regards the exact number of times a usage must be proved before judicial notice of it will be taken. It would seem that the mere proof and establishment of a valid usage once only does not of itself entitle a person in a subsequent action to dispense with proof of the usage; but, on the other hand, where there are several cases in which the usage has been established, this fact of itself will cause the court to take judicial notice of the usage. The cases must not be contradictory, but must appear to the court to be sufficient to establish that the alleged usage has been frequently proved.

In the instant case, the parties were only at the primary stage and the particular trade custom or usage alleged by Cosdel had yet to be proved with certainty and precision. Counsel for Cosdel had not cited a single decision of any court in Singapore in which it was held that 'such a trade custom in Singapore more prevalently known as the consignment trade' had been proved to exist. So far as we are aware, such commercial trade custom or usage has not been proved in our courts. In the circumstances, we are of the opinion that the learned judge, with respect, ought not to take judicial notice of the common practice of consignment trade in Singapore.

In the case of *Re Matthews, ex p Powell*,[2] one Milling, a furniture dealer, supplied certain furniture on hire to Matthews for the operation of the latter's hotel. The terms of the hiring were that the property in the furniture remained vested in Milling and that certain payments were to be made, and, in default of payment, Milling was entitled to retake possession of the furniture, but, if the whole of the payments were made, then the furniture was

to become the property of Matthews. During the continuance of hiring, Matthews committed an act of bankruptcy and subsequently became a bankrupt. The question was whether the furniture was, at the time when Matthews committed the act of bankruptcy, in the possession of Mathews as the reputed owner. Milling claimed the furniture as against the trustee in bankruptcy alleging that there was a well-known custom of letting furniture to hotel keepers so that the furniture was not in the order and disposition of the bankrupt. In support of his claim, he relied on affidavits of three furniture dealers which were all substantially to the effect that it was a common custom in the trade to allow persons to have possession of furniture and effects upon hiring agreements whereby, if the whole of the payments outstanding under the hire agreements were duly made, the property in such furniture became vested in such persons. It was held by the Court of Appeal that such evidence was insufficient to establish the custom. Mellish LJ, delivering the judgment of the Court of Appeal, had this to say about taking judicial notice of custom at pp 506-507:

> There is no doubt that a mercantile custom may be so frequently proved in courts of common law that the courts will take judicial notice of it, and it becomes part of the law merchant; and we see no reason why the same rule ought not to prevail in the court of bankruptcy. It seems a useless expense to require parties to prove by a large number of witnesses a custom which has been proved over and over again.
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> The question, however, arises, how is the Court of Appeal to ascertain whether a custom has been proved so frequently that it ought to be acted upon under slight evidence, or no evidence at all? We think that we ought to give great weight to the testimony of the Chief Judge, but that we cannot act on his opinion alone. Now, the members of the Court of Appeal who have heard this case argued are not themselves aware of any case in which the question of the validity of any custom which would entitle Milling to judgment has been raised, except those which are contained in the reports, and which were cited in the argument. Nor did the experienced counsel who argued the case state that they had been engaged in any other cases in which the existence of the custom was raised.

The learned judge later said at p 507:

> On the whole, we are of opinion that we cannot hold that any custom which would entitle the respondent to the judgment of the court has been proved in the court of bankruptcy in so many cases that the court ought now to take judicial notice of it.

As to the second question, Cosdel, apart from the three letters which it had solicited and obtained from the three companies referred to, had not proved the consignment trade custom on which it relied. As for the three letters, each was written as follows:

> I am writing to seek your kind assistance in confirming the consignment trade relationship between Cosdel (Singapore) Pte Ltd and your company in respect of our Hallmark greeting cards and related goods.
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> Under the consignment arrangement, our goods are delivered to and displayed in your store to enable a sale by you. All unsold goods remain the property of Cosdel (Singapore) Pte Ltd and are returnable to us. The merchandise display fixtures are supplied by Cosdel (Singapore) Pte Ltd to you on loan basis and they remain the property of Cosdel (Singapore) Pte Ltd. This consignment arrangement is a common practice in the retail trade for goods similar to ours.
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> If you agree to the above, please sign and return one copy of this letter.

Each of the letters was returned to Cosdel, and on each the addressee had signed at the space indicated. In our judgment, such a letter so obtained has no probative value. It was couched in terms precisely sought for by the writer and the words used were, in effect, those of the writer rather than the addressees. None of the addressees of the letters were called to testify on what they had confirmed, and none were cross-examined on the common practice of consignment trade. Hence, so far as they are concerned, the letters are purely a piece of hearsay evidence and are inadmissible to prove the truth of what was stated therein. Cosdel therefore had not adduced any evidence to establish the alleged trade custom of consignment trade on which it relied.

On this question, we also find of assistance the case of *Re Matthews, ex p Powell*[3] where the Court of Appeal held, inter alia, that the production of three affidavits by three dealers respectively was insufficient to prove a trade custom. Mellish LJ said at pp 507 to 508:

> We have next to consider whether the affidavits produced before the county court judge were sufficient to establish a custom in favour of the respondent, having regard to the fact that the witnesses were not cross-examined, and that no evidence was given on the other side. Now the question of the amount of evidence which is sufficient to establish a custom of the kind has been lately considered by the Court of Appeal in Chancery in the two cases of *Ex p Watkins* Law Rep 8 Ch 520 and *In re Hill* [1875] Mar 24; and we think that the result of these cases is, that in order to establish a custom it must be proved to have existed so long, and and to have been so extensively acted upon, that the ordinary creditors of the debtor in his trade may be reasonably presumed to have known it.
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> The defect of the evidence in this case is, that, though it may prove that the practice of supplying customers with furniture under contracts of the description of that before us was one well known to and used by furniture dealers, it affords but a slight inference that it was so well known that the ordinary creditors of an hotel-keeper — the wine merchant, the spirit merchant, the brewer, the ordinary tradesmen of his town — were likely to know that it existed.

There still remains the issue, namely: whether the articles in question were at the material time in the possession, order or disposition of the tenant by the consent and possession of Cosdel under such circumstances that the tenant was the reputed owner thereof within the meaning of s 12(a) of the Act. The provision of s 12(a) embodies what is generally known as 'the doctrine of reputed own-

ership' in bankruptcy laws, and the material wording of s 12(a) is in pari materia with s 47(1)(b)(iii) of the Bankruptcy Act (Cap 20, 1985 Ed) which, so far as relevant, is as follows:

> 47(1) The property of the bankrupt divisible among his creditors, and referred to in this Act as the property of the bankrupt —
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> (a) ...
> (b) shall comprise the following:
> (i) ...
> (ii) subject to section 4(3) of the Bills of Sale Act, all goods being at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt by the consent and permission of the true owner under such circumstances that he is the reputed owner.

The provision of s 47(1)(b)(iii) is derived from the English Bankruptcy Acts and it is helpful to see how the courts in England applied such provision. (The doctrine of reputed ownership, however, was abolished in England by the Insolvency Act 1986.) The leading case is *Re Couston, ex p Watkins*.[1] There, the debtors who were wine and spirit merchants in Liverpool sold certain butts of whisky held in their bonded warehouse to one Watkin. After the sale, the butts of whisky were for the convenience of Watkin left in their bonded warehouse, but a delivery warrant was issued in which the debtors stated that they held the goods to his order as warehousemen. Subsequently, while the goods were still in the warehouse, the debtors filed a petition for liquidation by arrangement. The creditors resolved on liquidation and a trustee was appointed. Watkins claimed the goods from the trustee, which the latter resisted. The claim was tried in the county court and it was proved to be the usual custom of the wine and spirit trade in Liverpool for goods sold in bonded warehouse to remain in the possession or under the control of the vendors in the bonded warehouse until they were required by the purchasers. It was held by the Court of Appeal in Chancery that the existence of that custom, which was well known among persons concerned in the wine and spirit trade, excluded the application of the doctrine of reputed ownership and accordingly the goods did not pass to the trustee. Lord Selborne LC at the commencement of his judgment said at p 528:

> The principle of the law on this subject is well expressed in the preamble of the statute (21 Jac 1, c 19, s 10), to which reference has been made in the argument, and which particularly contemplates the case of persons selling goods and permitted to remain in possession of them, so that they can obtain credit as if the ownership had not been changed. That being the principle, two things are necessary to bring any case within it. First, that there should be what is called the order and disposition of the property; and secondly, that there should be, in point of fact reputed ownership arising from the circumstances. There is no inflexible rule of law that because a man who was once the owner of goods and has sold them remains in possession of them he must therefore be held to be the reputed owner. The statute does not say that. If he remains in possession with the reputation of ownership, and in those circumstances which create a reputation of ownership, then the property will pass to his assignees; but it is always a question of fact whether or not the circumstances are such as to create that reputation.

Later, he expounded the doctrine of reputed ownership as follows, at pp 528 to 529:

> The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject.
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> So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to shew that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods, one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession.

This exposition of the doctrine of reputed ownership is, with respect, somewhat convoluted; but it does set out broadly the approach the courts would adopt in applying the test of reputed ownership. To that statement of law should be mentioned also the following passage of the judgment of the Court of Appeal delivered by Vaughan Williams LJ in *Re William Watson & Co*[3] at pp 756 to 757:

> The question in this case is whether, at the commencement of the bankruptcy, certain goods were 'in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he was reputed owner thereof'. In our opinion it is essential before a court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership must arise. ... The doctrine of reputed ownership was first embodied in the Bankruptcy Act, 21 Jac 1. It has been couched in various words in the successive bankruptcy statutes, but this principle has run through them all, and the statement of Lord Redesdale in *Joy* v *Campbell* 1 Sch & Lef 328 (a case which has been approved and acted on again and again: see *Belcher* v *Bellany* 2 Ex 303, *Hamilton* v *Bell* (1854) 10 Ex 545 and many other cases), that the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt, justifies this statement.

> This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise: see *Hamilton* v *Bell* (1854) 10 Ex 545, *Gibson* v *Bray* (1817) 8 Taunt 76, *Ex parte Bright* 10 Ch D 566.

This test of reputed ownership was adopted by PO Lawrence J in the case of *Re Kaufman Segal and Domb*.[4] There, a buyer purchased from a firm, which carried on the business of clothing manufacturers and merchants, certain chattels used by the firm in connection with their business. The firm did not part with possession of the chattels which remained in their possession down to the date of the receiving order. A few days after the purchase the buyer let the chattels to the firm under a hire-purchase agreement whereby it was provided, inter alia, that the firm should become purchasers of the chattels upon payment of all the instalments of rent as provided therein and during the continuance of the hiring the chattels would remain the property of the buyer. Subsequently, a receiving order was made against the firm and the partners were adjudicated bankrupts. The trustee in bankruptcy sought a declaration that the chattels formed part of the estate of the bankrupts, as being in the order and disposition of the bankrupts in their trade or business with the consent of the true owners in such circumstances that the bankrupts were reputed owners thereof. It was held, inter alia, that in all the circumstances the inference which 'must' arise was that the chattels belonged to the bankrupts. PO Lawrence J said at pp 93 t o 94:

> Mr Hansell has contended that the trustee in bankruptcy, in order to bring chattels within the order and disposition clause of s 38 of the Bankruptcy Act 1914, must prove, not only that the bankrupts are in possession of the goods, but also that they are in possession of the goods under such circumstances that the inference of ownership in the bankrupts 'must' arise; and he relies, in support of this proposition, on the judgment of the Court of Appeal delivered by Vaughan Williams LJ in *In re Watson & Co* [1904] 2 KB 753, 757. I think that the proposition upon which Mr Hansell bases his argument on this point is right; that is to say, that the court is bound to come to the conclusion that the inference of ownership which would be drawn by the public is not merely one that 'may or may not' arise, but is one that 'must' arise.
>
> In the present case I have come to the conclusion that the right view to take is, that, in the absence of any general custom as to hiring, the inference which a reasonable man would necessarily draw from the fact that the articles in question were in the possession of the bankrupts and were being used by them in their trade is that these articles belonged to the bankrupts, and that the inference so drawn is an inference which within the meaning of Vaughan Williams LJ's statement of the law 'must' arise.

We now turn to examine the fact in this case and, applying the test adopted by Lawrence J, determine whether in all the circumstances, a reasonable man would necessarily infer that the tenant was the owner of the articles in question, and that this inference is one which *must* in the circumstances arise. Cosdel's articles were displayed on the shelves belonging to Cosdel in a designated area within the demised premises, and (so it was claimed by Cosdel) the layout, design, colour scheme and general appearance of the shelves bore Cosdel's distinctive features common to all its stores in Singapore and were different from those of the tenant; all Cosdel's articles, except 'Hallmark' cards, displayed for sale in the demised premises were labelled with the price tags bearing Cosdel's business name, 'Kalm's; at all times there were two salesgirls employed by Cosdel who attended to the sales of the articles, and these two salesgirls wore uniforms different from those worn by employees of the tenant. These external appearances are the only material pointers which could, if at all, indicate that the articles on Cosdel's shelves belonged to Cosdel. On the other hand, there are very compelling circumstances to the contrary which negative such indications. Though separate shelves were used to display Cosdel's articles and presumably they were in a separate area allocated for the purpose, there was no partition between this area and the other areas which displayed and sold goods belonging to the tenant, and all the shelves were placed in an open area. Hence, any customer visiting the demised premises would have observed that only one business was carried on thereat and that was the business of the tenant. There was nothing in the shop to show that the tenant was not the owner of all the goods, chattels and other movable property within the demised premises; no signboard was displayed either within or without the demised premises indicating that the articles sold on Cosdel's shelves were those of Cosdel. As regards the name 'Kalm's, Cosdel had not adduced any evidence to show that the public, and in particular, customers visiting the demised premises would know what 'Kalm's' was or whose name it was, and why the fact that the articles had price tags with the name 'Kalm's' on them should disabuse such customers of the impression that these articles belonged to the tenant. After all, it was the tenant who owned and operated the business in the demised premises, who actually sold the articles and who gave valid receipts for the payments therefor. As to the fact that Cosdel had two salesgirls attending to the sales and wearing uniforms different from those worn by the tenant's salesgirls, their presence could not truly indicate to customers visiting the demised premises, who know nothing of 'Kalm's', or even to those who know that they are girls engaged to promote and attend to the sales of 'Kalm's' products, that the products they sold did not belong to the tenant, particularly, having regard to the fact that the sales were carried out by the cashiers of the tenant and the receipts were issued in the name of the tenant. In such circumstances, the inference which a reasonable man would necessarily draw is that all articles displayed for sale

in the demised premises belonged to the tenant, and the inference is one which, in those circumstances, must arise. In our view, on these facts, the articles in question were in the possession, order or disposition of the tenant by the consent and permission of Cosdel under such circumstances that the tenant was the reputed owner thereof. In view of our conclusion on this issue, s 10 of the Act has no application, and no order ought to be made for the release of the articles.

There is one further issue which was not decided in the court below, but which was raised and argued before us. Under s 10(2) of the Act, no order of release shall be made unless Cosdel satisfies the court that the tenant at the time of distress had no right of property or beneficial interest in the articles claimed by Cosdel. The issue therefore is whether the tenant had any right of property or beneficial interest in the articles. Here again, the burden is on Cosdel, and for this purpose it is necessary to examine the evidence adduced by Cosdel in discharge of this burden. In the first affidavit filed in support of the application for release, David Ang, the general manager of Cosdel, said that the articles in question belonged to Cosdel and produced a bundle of consignment notes and other documents in support. All the consignment notes issued by Cosdel were actually sale invoices which gave a description of the goods and the prices thereof and bore an indorsement at the bottom: 'NB. Goods sold are not returnable'. These documents therefore did not really support David Ang's claim. On the contrary, they showed that the goods had been sold by Cosdel. In his second affidavit, David Ang said that the arrangement made between Cosdel and the tenant was that the articles would be consigned to the tenant for sale in the demised premises and the tenant would collect the sale proceeds and after payment of the monthly sum would pay the proceeds to Cosdel, and that whatever articles which had not been sold belonged to and remained at the risk of Cosdel. He also relied on the fact that the provisional liquidator of the tenant — liquidation of the tenant having then commenced — had acknowledged that the tenant had no right of property or beneficial interest in the articles and the articles were the property of Cosdel. What he alleged here was not wholly borne out by the arrangement which was made between Cosdel and the tenant, and in this connection, the affidavit of Yee Oi Yoke, the personal assistant to the managing director of the tenant, is of assistance. Yee said that Cosdel's articles were displayed in open shelves provided by Cosdel in the demised premises and the sales were attended to by Cosdel's promoters — sometimes one and sometimes two — and she produced the document which formalized the arrangement between the two parties. However, the sales of Cosdel's articles were transacted through the tenant's cashiers who, using a special code assigned for such sale, collected moneys and issued receipts bearing the tenant's name. The transactions were entered in the books of the tenant and on the tenth day of each month the tenant paid to Cosdel the total collections from the sales of Cosdel's articles for the preceding months after deducting for the tenant's own account the sum of $4,560, being the monthly sum charged to Cosdel. The document exhibited by Yee contained, inter alia, two material provisions, namely, (i) that the tenant was required to take out insurance on all merchandise and fixtures in the demised premises against fire and theft, and (ii) that interim and year-end physical stock counts would be taken of the goods displayed by Cosdel and any stock discrepancy in excess of 3% of the record values should be shared equally between Cosdel and the tenant at the 'retail value of the merchandise'. All these showed that the tenant had some right of property in the articles. In particular, the tenant had the property in the articles which it could pass to purchasers on sale of the articles, and all such sales were transacted by the tenant. On the basis of the evidence adduced, Cosdel clearly had not, in our opinion, discharged the burden of proving that the tenant had no right of property in the articles at the material time. Accordingly, on this issue, the appellant also succeeded.

Appeal allowed.

Solicitors: *Allen & Gledhill*; *Godwin & Co.*

Reported by *Zarinah Marican*

Poh Kiong Kok v Management Corporation Strata Title Plan No 581

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 180 OF 1990
CHAN SEK KEONG J
19 JULY 1990

Land Law — Condominiums — Management corporation — Each subsidiary proprietor granted exclusive use of one parking lot — Whether such scheme illegal — Land Titles (Strata) Act (Cap 158, 1985 Ed), s 41(8) & First Schedule byelaw 8

The plaintiff is a joint subsidary proprietor of a residential unit in a condominium. The defendant is the management corporation of that condominium. At the condominium, there was a parking scheme which regulated the enjoyment and use of parking lots by the subsidary proprietors whereby each proprietor was only allowed to park his car at the parking lot allocated to him and at no other. No resident was without a reserved lot, but some lots were better than others. The defendant ignored the complaints of the plaintiff about the unfairness of the scheme. The plaintiff therefore commenced the action for, inter alia, a declaration that no subsidary proprietor was allowed to be excluded from the use of enjoyment of any part of the common property where that part was used by another subsidary proprietor. The plaintiff complained of abuse of power of the defendant